

Sir Thomas Industrial Building Maintenance Company, Inc. and Service Employees International Union, Local 1877, AFL-CIO. Case 32-CA-15818

May 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge and first amended charge filed by the Union on November 19, 1996, and February 14, 1997, the General Counsel of the National Labor Relations Board issued a complaint on February 25, 1997, against Sir Thomas Industrial Building Maintenance Company, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charges and complaint, the Respondent failed to file an answer.

On April 8, 1997, the General Counsel filed a Motion for Summary Judgment with the Board. On April 9, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated March 24, 1997, notified the Respondent that unless an answer were received by April 2, 1997, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation, has been engaged in the provision of commercial janitorial and cleaning services. During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, provided services valued in excess of

\$50,000 directly to customers or business enterprises who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees described in and covered by Section I, "Recognition" of the November 1, 1991, through November 30, 1993 collective-bargaining agreement between the Respondent and the Union, as extended through May 31, 1996 (the 1993-1996 agreement); excluding all other employees, guards, and supervisors as defined in the Act.

Since at least November 1, 1991, the Union has been the designated exclusive collective-bargaining representative of the unit employees, and since that date, the Union has been recognized as such by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was the 1993-1996 agreement. Since at least November 1, 1991, and at all material times, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The 1993-1996 agreement contained, inter alia, provisions calling for payment and/or deductions by the Respondent of contributions on behalf of unit employees to health and welfare and pension trust funds (the trust fund provisions); provisions regarding the accrual and payment to unit employees of vacation benefits (vacation provisions); and provisions regarding the checkoff of union membership dues on behalf of unit employees and the remittance of the dues to the Union (the dues-checkoff provisions). These provisions relate to wages, hours of employment, and other terms and conditions of employment of unit employees and are mandatory subjects for the purposes of collective bargaining.

Since at least May 19, 1996, the Respondent has failed to honor the dues-checkoff provision in that while deducting union membership dues from unit employees' paychecks, it has failed to remit the dues to the Union. Since approximately June 1996, the Respondent has failed to honor the trust fund provisions.

Since about August 30, 1996, the Respondent has failed to honor the vacation provisions. The Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the conduct and the effects of that conduct, and without the agreement of the Union.

About August 30, 1996, the Respondent sold all its assets and ceased all operations. The Respondent did so without prior notice to the Union and without affording the Union a reasonable, preclosure opportunity to bargain with the Respondent with respect to the effects of the closure decision.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) since at least May 19, 1996, in that while deducting union membership dues from unit employees' paychecks, it failed to remit said dues to the Union, pursuant to valid dues-checkoff authorizations, we shall order the Respondent to remit any unremitted dues that were deducted from at least May 19, 1996, until the contract's expiration, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the health and welfare and pension trust funds since about June 1996, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required

contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.²

Furthermore, having found that the Respondent violated Section 8(a)(5) and (1) by failing to honor the contractual provisions regarding the accrual and payment to unit employees of vacation benefits since about August 30, 1996, we shall order the Respondent to make the unit employees whole for any loss of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain over the effects of the closure decision, we shall require the Respondent to bargain with the Union concerning the effects of the closure on its unit employees, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closure on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on

¹ As indicated above, the 1993-1996 agreement, and thereby the authority and duty of the Respondent to deduct union membership dues from employees' paychecks, expired on May 31, 1996. *R.E.C. Corp.*, 296 NLRB 1293 fn. 3 (1989). Presumably no further, unauthorized, deductions were made after that date. Deductions made after expiration of the contract must be returned to the employees. See *Peerless Roofing Co.*, 247 NLRB 500, 506 fn. 17 (1980).

² To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

In view of the fact that the Respondent's facility is currently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Sir Thomas Industrial Building Maintenance Company, Inc., Santa Clara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally failing to honor the contractual dues checkoff provision by failing to remit to the Union the dues that have been deducted from unit employees' paychecks, failing to honor the contractual trust fund provisions, or failing to honor the contractual vacation provisions for the following unit employees:

All employees described in and covered by Section I, "Recognition" of the November 1, 1991, through November 30, 1993 collective-bargaining agreement between the Respondent and the Union, as extended through May 31, 1996; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Selling all its assets and ceasing all operations without prior notice to the Union or without affording the Union an opportunity to bargain with respect to the effects on the unit employees of the decision.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit to the Union, with interest, the dues that were deducted from the pay of unit employees, since at least May 19, 1996, until the expiration of the 1993-1996 agreement, pursuant to valid dues-checkoff authorizations.

(b) Honor the terms and conditions of the 1993-1996 agreement, and make the unit employees whole for any loss of earnings or benefits or expenses incurred resulting from its failure to honor the trust fund provisions since about June 1996, and the vacation

provisions since about August 30, 1996, in the manner set forth in the remedy section of this decision.

(c) Upon request, bargain collectively and in good faith with the Union with respect to the effects on the unit employees of its decision to sell all its assets and cease all operations, and reduce to writing any agreement reached as a result of such bargaining.

(d) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, mail an exact copy of the attached notice marked "Appendix"³ to Service Employees International Union, Local 1877, AFL-CIO, and to all unit employees. Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally fail to honor the contractual dues-checkoff provision of the 1993-1996 agreement by failing to remit to the Service Employees International Union, Local 1877, AFL-CIO the dues that have been deducted from unit employees' paychecks, fail to honor the contractual trust fund provisions, or fail to honor the contractual vacation provisions for the following unit employees:

All employees described in and covered by Section I, "Recognition" of the November 1, 1991, through November 30, 1993 collective-bargaining

agreement between Sir Thomas Industrial Building Maintenance Company, Inc. and the Union, as extended through May 31, 1996; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT sell all our assets and cease all operations without prior notice to the Union or without affording the Union an opportunity to bargain with respect to the effects on the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remit to the Union, with interest, the dues that were deducted from the pay of unit employees, since at least May 19, 1996, until the expiration of the 1993-1996 agreement, pursuant to valid dues-checkoff authorizations.

WE WILL honor the terms and conditions of the 1993-1996 agreement, and make the unit employees whole for any loss of earnings or benefits or expenses incurred resulting from our failure to honor the trust fund provisions since about June 1996, and the vacation provisions since about August 30, 1996, with interest.

WE WILL, on request, bargain collectively and in good faith with the Union with respect to the effects on the unit employees of our decision to sell all our assets and cease all operations, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay our unit employees their normal wages for the period set forth in a decision of the National Labor Relations Board.

SIR THOMAS INDUSTRIAL BUILDING
MAINTENANCE COMPANY, INC.